

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 42667-S411 BY JAROMIR J. DAN) FINAL ORDER

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision in this matter has expired. A timely exception and comments were received from Jaromir Dan, and a timely comment was received from the Helena Water Rights Bureau Field Office. After having given the exceptions and comments full consideration, the Department accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the October 1, 1985 Proposal for Decision, and incorporates them herein by reference, along with the clarifications specified below.

RESPONSE TO EXCEPTIONS AND COMMENTS

The Helena Water Rights Bureau Field Office submitted an October 3, 1985, Memorandum in response to the Proposal, indicating that a typographic error has been made in the first sentence of paragraph 2 on page 3 of the Proposal: Blue Cloud Creek is shown as "Blue Creek". The erratum hereby is noted, and the sentence is corrected to read, "Frank Gruber objected to the Application on the basis that Blue Cloud Creek is the only source

CASE # 42667

of stockwater he has for a 500-acre pasture, that Blue Cloud Creek in a dry year barely provides enough water for the stock, and therefore that any appropriation upstream from him would eliminate his only stockwater source."

Although not mentioned in the Memorandum, the same erratum also appears in the description of Exhibit 8 (page 5, Proposal for Decision). It also is corrected herein to read "Exhibit 8 shows a dry creek bed on Blue Cloud Creek"

The Applicant does not object to the decision which has been proposed in this matter. However, he has submitted several concerns which he wishes addressed in order to clarify the record on this Application.

The Applicant's first concern is that the issue of the reduction in acreage between the time of Application and the hearing has not been clarified in the Proposal for Decision, and that he appears to be intending to irrigate land belonging to his neighbors. This issue was addressed in Finding of Fact 9 in the Proposal for Decision. However, to ensure that the reduction is clear for purposes of the record, the following sentence will be added to the first paragraph of Finding of Fact 9: "Therefore, the Applicant has reduced the acreage of the proposed place of use from 50 acres to 30 acres."

Also with regard to Finding of Fact 9, the Applicant states that he is not the "manager" of the property in the sense of being paid, but rather that he is the renter. Mr. Dan testified

at the hearing that he was the "operator", and it is in this sense of the word that he is described as the manager. Therefore, for the purposes of this Application, Finding of Fact 9 is sufficiently clear and does not need correction.

Some of Mr. Dan's comments appear to be the result of a mis-reading of the Proposal for Decision, i.e., Mr. Dan states that Mr. Wall purchased Mineral Survey 609, No. 43 and 48 Placers, and that Mrs. Clausen never owned them. Nothing in the Proposal suggests that Bertha Clausen claims to have owned them (see Finding of Fact 12). The phrase in Finding of Fact 13 which refers to her living on "that" property is a reference to the previous sentence concerning the property now owned by Frank Gruber. For purposes of clarification, the second sentence of Finding of Fact 13 hereby is amended to read, "She testified that she had lived on the property now owned by Frank Gruber from 1947 to 1971, and that she was familiar with Blue Cloud Creek, and with the Smallwood ranching operation, in addition to their own uses." Additionally, Mrs. Clausen did not claim to have lived on Blue Cloud Creek, as Mr. Dan apparently believes she claimed, but rather that she is familiar with the creek.

Additionally, Mr. Dan states in his exception that Objector Smallwood irrigates his 15 acres from a well, rather than from Blue Cloud Creek. A review of the record shows that Mr. Smallwood testified that he has irrigated from the creek (Finding of Fact 15); this was not contradicted by Mr. Dan at the hearing, nor was evidence introduced that Mr. Smallwood now irrigates

from a well. Mr. Dan also objects to Mr. Smallwood and the other Objectors being referred to as "prior appropriators" (Conclusion of Law 6), on the basis that it is not clear that they are prior appropriators. However, the Statements of Claim of Existing Water Rights which Mr. Smallwood and others have filed constitute prima facie evidence of the existence of water rights which are senior to Mr. Dan's Application. MCA § 85-2-227.

The Applicant excepts to the language in Finding of Fact 10 in the Proposal which states, "Mr. Dan testified that he might not develop the pond even if he could, due to alleged harassment and intrusions by residents of the area." Mr. Dan wishes it clarified that the alleged harassment and intrusion have not been made by his neighbors and people in his immediate vicinity, but rather by visitors whose actions are being "orchestrated" by parties in Helena. Therefore, solely for the purpose of clarifying the fact that Mr. Dan is not accusing the other parties to this case or his other neighbors, if any, the word "Helena" is inserted in the final sentence of Finding of Fact 10: the sentence shall read, "Mr. Dan testified that he might not develop the pond even if he could, due to alleged harassment and intrusion by residents of the Helena area."

Mr. Dan also makes several comments on the Proposal to the effect that he believes Blue Cloud Creek to be an intermittent stream, fed by springs and drainage and not fed by the unnamed tributary during the times of irrigation. Mr. Dan's argument appears to be that conditions in Blue Cloud Creek are therefore irrelevant to his proposed appropriation.

The Department notes Mr. Dan's testimony concerning the possibility that the water from the unnamed tributary might not make it to the mainstem of Blue Cloud Creek. (Finding of Fact 6.) However, this possibility is contradicted by Mr. Dan's own description of Blue Cloud as an intermittent stream (since the tributary's water may be entering Blue Cloud Creek even if surface water is not visible), by Jim Beck's description of the "disappearance" and reappearance of the stream in the gravel under low flow conditions (see Finding of Fact 19, Footnote 2), and by the testimony of Frank Gruber and of Jim Beck concerning the contribution of the tributary to flow in Blue Cloud Creek. (See Findings of Fact 14, 19.) Therefore, the Applicant's exception to Conclusion of Law 6 will not result in a modification of the Conclusion.

It should be noted that even if Mr. Dan's characterization of the streamflow is correct, it does not affect the decision in this particular matter, although a clear understanding of the hydrology of Blue Cloud Creek might be of benefit in future water rights actions. In the present matter, the decision to deny has been made on other grounds. (See Conclusion of Law 8.)

Mr. Dan's remaining exception was an objection to Objectors' Exhibit 7, which Mr. Dan claims to have objected to at the hearing and which he feels should be removed from the record because it is "irrelevant, immaterial and as such, prejudicial."

A review of the record in this matter discloses the fact that Mr. Dan did not object to Objectors' Exhibit 7 at the hearing. He did object to Objectors' Exhibit 8 on the basis that it shows

the mainstem of Blue Cloud Creek on the R.V. Ranch, and therefore is irrelevant to his Application, since the proposed source is the unnamed tributary as it crosses the Applicant's land.

The Hearing Examiner stated that the location would be so noted for the record, and the description of Exhibit 8 in the Proposal does note that the location of the photograph in question is on Blue Cloud, not on the tributary. However, for purposes of fully clarifying the record, the sentence on page 6 of the Proposal which reads, "Objectors' Exhibits 1 through 32 were accepted into the record without objection" is hereby modified to read, "Objectors' Exhibits 1 through 7 and 9 through 32 were accepted into the record without objection."

Additionally, the following language will be added: "The Applicant objected to Objectors' Exhibit 8 on the basis that it depicts the mainstem of Blue Cloud Creek above its confluence with the unnamed tributary, and as such, is irrelevant. Although Mr. Dan is correct as to the location of the area photographed, his objection is overruled on the basis that the Exhibit tends to substantiate testimony by the Objectors that the bulk of the water in Blue Cloud Creek was coming from the unnamed tributary at the time of the site visit."

Therefore, based upon the Findings of Fact and Conclusions of Law, all files and records in this matter, and any modifications specified herein, the Department makes the following:

FINAL ORDER

Application for Beneficial Water Use Permit No. 42667-s41I by Jaromir J. Dan is hereby denied.

DONE this 14th day of November, 1985.

Gary Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT)
NO. 42667-s411 BY JAROMIR J. DAN)

ORDER

* * * * *

On April 2, 1984, the Department of Natural Resources and Conservation issued a Show Cause Order to Objectors Montana Power Company (hereafter, "MPC").

I. Memorandum of Cause by MPC

A. MPC's response to the Show Cause Order also reasserted several of their arguments made in response to the Proposal for Decision in Don Brown. The Department incorporates its response to MPC's arguments numbered 2, 3, 6, 8, 10 as set forth in the Final Order in Don Brown, April 24, 1984.¹

¹ These MPC arguments are:

2. Unappropriated water in the proposed source is non-existent.
3. Property rights will be adversely affected.
6. Evidence shows the Power Company's water rights are presently not being satisfied.
8. The Order changes the statutory burden of proof.
10. All Final Orders issued by the Department are afflicted with errors of law and are otherwise improper, and the Power Company has appealed every Final Order which adversely affects its rights.

MPC's argument number 10 is too vague to be responded to with particularity. MPC suggests the hearing officer look at the docket as evidence that MPC has presented arguments that Don Brown is afflicted with errors of law or otherwise improper. MPC's complaint, however, is still too vague to provide the Department any substantive clue as to the errors MPC claims infect Don Brown.

B. MPC's most fundamental objection is that the Show Cause Orders are beyond the DNRC authority. This is incorrect. The Department will first address this issue, settling the arguments numbered 1 and 11 raised by MPC.²

(1) Statutory Authority

Among the duties mandated to be carried out by the Department by broad legislative delegation of authority is MCA § 85-2-112(1), (2).

"The Department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-113, subject to the powers and duties of the Supreme Court under 3-7-204;.

(emphasis added)

(2) prescribe procedures, forms, and requirements for applications, permits, certificates...and proceedings under this chapter...". (emphasis added)

The only limiting language refers to MCA § 3-7-204. That section refers to the supervision by the Montana Supreme Court of the "activities of the water judge, water masters, and associated personnel in implementing this Chapter and Title 85, Chapter 2, Part 2..." Additionally, the statute provides for the Supreme Court to pay the expenses of the water court and staff. Clearly, MCA § 3-7-204 has no bearing on Departmental authority to administer the new appropriations program.

² These MPC objections are:

1. The Department has acted beyond its authority.
11. The Order is a denial of due process and equal protection guaranteed by both the federal and state constitutions.

C With regard to enforcement and administration of the Water Use Act, Chapter 2, there is no limiting statutory provision. The Department must act, in furtherance of the Act's policies and according to its own procedural guidelines under the authority of the statutes and limited only by applicable Board Rules.

The Board has adopted, effective April 27, 1984, procedural rules for water right contested case hearing.³ Thus, currently, the guiding statutory and regulatory authority is the Water Use Act, the Administrative Procedures Act, and the Board Rules. MCA Title 85, Chapter 2; MCA § 85-2-121; MCA § 2-4-601 et seq.; Administrative Rules of Montana (hereafter, "ARM") Chapter 12, Subchapter 2.

C The Department having been expressly delegated the duty to enforce and administer the Water Use Act, Chapter 2, the pertinent provisions thereof frame the question of administrative authority herein. The Water Use Act (hereafter, the "Act") specifies as one of its purposes, the implementation of a constitutional mandate. MCA § 85-2-101(2).⁴

³ The result reached herein would be the same under the previously effective Attorney General Model Rules 8-21, governing contested cases. Administrative Rules of Montana §§ 1.3.211-1.3.225.

⁴ § 85-2-101(2) provides: "A purpose of this chapter is to implement Article IX, section 3 (4) of the Montana constitution, which requires that the legislature provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights. The legislature declares that this system of centralized records recognizing and establishing all water rights is essential for the documentation, protection, preservation, and future beneficial use and development of Montana's water for the state and its citizens and for the continued development and completion of the comprehensive state water plan."

The specific portions of the Act involved herein are found in Part 3 of the Act. Therein, with certain irrelevant exceptions, a person's right to appropriate water is limited to being obtained through compliance with the procedures for applying for and receiving a permit from the Department.

After July, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive.

MCA § 85-2-301 (1983). Those procedures deemed essential for proper administration and enforcement of the constitutional mandate are specifically detailed in the Act. See, e.g.: evidentiary provision in § 85-2-121 MCA (1983); notice requirements of MCA § 85-2-307; hearing requirements of MCA § 85-2-309 (1983). Similarly, those substantive criteria intended to limit and define delegated departmental duties are explicit. MCA § 85-2-311, MCA § 85-2-402.⁵

Otherwise, of course, it is established that the Act did not change the substantive rules and policies of Montana Water Law, but merely gave the Department authority to administer the collection of rights and responsibilities commonly called "water law" similarly to previous water right administration by District

⁵ Hence, the constitutional requirement of meaningful standards to guide agencies in exercising their delegated authorities is clearly met. ART. III § 1, Mont. Const. See, discussion below. MONT. CONST. art. 3 § 1.

C Court. Castillo v. Kunneman, 39 St. Rep. 460, 642 P.2d 1019 (1982). Where the legislature intended to change previous substantive law, or to clarify it, the substantive features of long-time common law were incorporated into the Act. See, §§ 85-2-102(1)(2), 85-2-311, 85-2-402 MCA (1983). Otherwise, the only differences between pre-Act law, and post-Act law, other than those expressly codified in the Act, would be those arising from the difference in the nature of an administrative proceeding, and a proceeding in a District Court. (See, Interlocutory Order, Beaverhead Partnership, re: Burden of Proof, for an example of shifting burden of proof necessarily concomitant to the procedural differences between a District Court action and an administrative proceeding.)

C The Act prescribes certain mandatory procedures the Department must follow in applying the substantive determinations required in granting, denying, or conditioning applications for permits and change authorizations. MCA §§ 85-2-307, 85-2-309, 85-2-310, 85-2-402. To impose additional procedural requisites upon the Department would be contrary to the well-known maxim "expressio unius est exclusio alterius". That is, where procedural specifics are imposed on certain Department actions, and excluded in other grants of power, it is assumed that those provisions were intentionally excluded. State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 62 P.2d 330 (1936).

C The Department's authority to strike the instant objection without hearing arises by necessary implication from these statutes, and the general laws defining and circumscribing the powers and duties of the Department. See, State ex rel. Dragstedt v. State Board of Education, supra.

Determination of whether the MPC objections are valid has been expressly delegated to the administrative discretion of the Department. Where an objection is deemed invalid, the Department has no duty to hold a hearing thereon, and, further, the determination of the validity of the objection is solely within the agency's discretion. "If the department determines that an objection to an application for a permit states a valid objection to the issuance of the permit, it shall hold a public hearing on the objection...". MCA § 85-2-309.

C The only statutory limitation to guide the agency's discretion in determining an objection's validity is the legislative standard for minimum contents of objections.⁶

The objection must state the name and address of the objector and facts tending to show that there are no unappropriated waters in the proposed source, that the proposed means of appropriation are inadequate, that the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation, that the proposed use of water is not a beneficial use, or that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. MCA § 85-2-308.

Interpretation of § 85-2-308 MCA (1983) must be consistent with § 1-2-106 MCA (1983):

6 Further, the objection, to be timely, must be filed within the time limit specified by the Department in the public and individual notice on the application. MCA § 85-2-308.

Words and phrases used in the statutes of Montana are construed according to the content and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law...are to be construed according to such peculiar and appropriate meaning or definition (emphasis added).

Because the common law of the state has given full dimension to the bare-boned water use statutes, the statutory terms have acquired such an appropriate meaning, e.g.: "beneficial use", Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898); Atchison v. Peterson, supra; Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900), appropriative "intent"; Featherman v. Hennessey, 42 Mont. 535, 115 P. 983 (1911); Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); St. Onge v. Blakely, 76 Mont. 1, 245 P. 532 (1926); Toohey v. Campbell, supra; "adverse affect"; Owigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940); unappropriated waters; Carey v. Department of Natural Resources and Conservation, _____ St. Rep. _____ (1984); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 ALR 200 (1933); Ide v. United States, 263 U.S. 497 (1924).

Hence, in determining the validity of objections, the Department must apply the common law and statutory law of the Act. Application of that law shows that MPC's objections are not valid. See, Don Brown, Final Order.

Whether the facts on an objection tend to show any of the required criteria is a mixed question of fact and law. The facts necessary to allege such a tendency are frequently complicated

and technical matters within the Department's expertise, involving determination of the source of supply for the proposed use, quantification of water in that source, quantities of the objector's water rights and the quantity and nature of the depletive effects of the proposed use. The legal issues involve whether the objector has stated a legally protectible interest by virtue of the facts alleged in the objection. Clearly these issues fall within the reasoning set forth in Burke v. South Phillips County Co-operative State Grazing District, 135 Mont. 209, 339 P.2d 491 (1959):

Where the question involved is within the jurisdiction of an administrative tribunal which demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of trained officers to determine technical and intricate matters of fact, and where a uniformity of ruling is essential to comply with the state's policy and the purposes of the regulatory statute on review by the court of such decisions by such authorities, the courts will require only so far as to see whether or not the action complained of is within the statute and not arbitrary or capricious. At 218.

In summary, the Department must act in furtherance of the policy of the Montana Water Use Act in administering and enforcing the Act. § 85-2-101 MCA (1983). That policy, when read in conjunction with the remainder of the Act and the one hundred year old case law interpreting prior (but similar) statutes, clearly defines the substantive water law and policies to be applied by the Department in administering the Act. Procedurally, the Department is, of course, limited only by the Montana Administrative Procedures Act, and applicable provision

of the Montana and United States Constitutions. The Department's actions are proper according to all of these applicable substantive and procedural limitations.

Given the Department's specific authority to determine the validity of objections, and the exhaustive analysis of Don Brown, it is clearly within Departmental authority to strike MPC objections, using whatever fair procedures the Department deems appropriate to the case.

(2) Constitutional Authority

Having demonstrated the clear statutory authority for dismissing MPC's objections without hearing, the only remaining roadblock would be if this delegated authority were unconstitutional. It is not. The legislative authority to so delegate stems from a direct constitutional mandate that, "The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records". MONT. CONST. art. 9, § 3, paragraph (4).

The issue is whether the legislature has broached the Montana Constitution's fundamental structure of a tripartite government by delegating unbridled discretion to an agency, i.e., whether the agency is delegated fundamentally legislative functions.

The power of the government of this state is divided into three distinct branches - legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted. MONT. CONST. art. 3, § 1.

C Of course, the analysis begins with the fundamental notion that an act is presumed constitutional, prima facie. State v. Stark, 100 Mont. 365, 52 P.2d 890 (1935). The test for proper legislative delegation of authority to an administrative agency was set out in Bacus v. Lake County, 138 Mont. 69, 354 P.2d 1056 (1960); Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977); and recently affirmed as controlling in T. & W. Chevrolet v. Daryial, 39 St. Rep. 112 (1982). The Court stated in Bacus:

...When the legislature confers authority upon an administrative agency it must lay down the policy or reasons behind the statute and also prescribe standards and guides for the grant of power which has been made to the administrative agency. The rule has been stated as follows:

'The law making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers of an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this regard is invalid....'.

...In the case of Chicago, M. & St. P.R. Co. v. Board of R.R. Com'rs, 76 Mont. 305, 314, 315, 247 P.162, 164 this court has stated:

'We think the correct rule as deduced from the better authorities is that if an act but authorizes the administrative office or board to carry out the definitely expressed will of the Legislature, although procedural directions and the things to be done all specified only in general terms, it is not vulnerable to the criticism that it carries a delegation of legislative power.' This rule has been approved in Northern Pacific R. Co. v. Bennett, 83 Mont. 483, 272 P. 987; Barbour v. State Board of Education, 92 Mont. 321, 13 P.2d 225; State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 47 P.2d 624, 100 A.L.R. 581; State v. Andre, 101 Mont. 366, 54 P.2d 566; State ex rel. Stewart v. District Court, 103 Mont. 487, 63 P.2d 141; and Thompson v. Tobacco

Root Co-op State Grazing District, 121 Mont. 445, 193 P.2d 811. See also State v. Johnson, 75 Mont. 240, 243 P. 1073. At 78 (citations omitted), 80.

The Water Use Act falls into the category described above, wherein the legislature has delegated to the Department authority to carry out the definitely expressed will of the legislature. Although the procedural directions are expressed in only general terms when such is the case, the agency is free to use its discretion procedurally. State v. Stark, supra.

In T & W Chevrolet, supra, the court applied the test of Bacus and Douglas, and found that a statute and administrative regulations thereunder designed to curb "unfair or deceptive acts or practices in the conduct of any trade or practice..." was not so vague as to be an unconstitutionally prohibited delegation of authority to the Montana Department of Commerce, the Federal Trade Commission or the Federal Courts. In doing so, the court pointed out that the nature of the practices sought to be prohibited demanded the use of general language, but that the well developed case law, amassed over 30 years, had sufficiently given shape and definition to the terms of the act so as to vest the general terms with the requisite meaning for the agency to appropriately administer the act.

The T & W Chevrolet case summarized the holdings in Douglas and Bacus as holding that, "...a legislature must prescribe with reasonable clarity the limits of power delegated to an administrative agency". At 1369. In citing to a Washington case, the T & W court quoted the following language:

...The language of the amended federal act...has been with us since 1938. The federal courts have amassed an abundance of law giving shape and definition to the words and phrases challenged by respondent. Now, more than 30 years after the Supreme Court said that the phrase 'unfair methods of competition' does not admit to 'precise definition', we can say that phrase, and the amended language has a meaning well settled in federal trade regulation law... The phrases 'unfair methods of competition' and unfair or deceptive acts or practices have a sufficiently well established meaning in common law and federal trade law, by which we are guided, to meet any constitutional challenge of vagueness. At 1370.

Further, the Court pointed out:

When reviewing the constitutionality of a given law, it is important to keep in mind the basic premise, well recognized in Montana, that the constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt. T & W Chevrolet, at 1370.

In the instant case, the vast bibliography of Montana Water Law more than sufficiently defines the terms used in the Water Use Act so that the Department may readily ascertain the specific and plain language thereof, and administer the same in accordance with the legislative intent. Hence, the Department has no doubt that the authority it has been delegated by the Act is fully within the legislature's constitutional authority to delegate, was properly delegated, and has been properly exercised herein. Having applied the well articulated Montana law to the allegations of MPC, the Department determined that the objections were not valid, and under the clear terms of the Water Use Act,

MCA § 85-2-309, no hearing thereon is necessary.⁷

MPC's due process argument is without merit. MPC was given more than ample opportunity to state a valid objection, and simply failed to do so. The Department has afforded MPC far more procedural protection than is constitutionally necessary, under both the state and federal constitutions. The Department made clear why MPC's objection is not valid, having provided MPC specific basis to respond to in the show cause order.

MPC, instead, has merely repeated vague shot-gun arguments alleging that the Department does not have the authority expressly delegated to it by § 85-2-309 MCA (1983).

The fair notice and meaningful opportunity to respond requirements of due process have been met several times over. See, Abrams v. Feaver, 41 St. Rep. 1588, 685 P.2d 378 (1984); Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983 (1972).

MPC's equal protection allegation is similarly frivolous. To accede to MPC's demands would in fact be setting MPC above the law, denying other objectors equal protection by immunizing MPC from the requirements the class of all other objectors must meet; stating a valid objection in order for the right to a hearing to

⁷ Contrast this situation with Douglas v. Judge, 174 Mont. 32, 568 P.2d 530 (1977), where the court found that a delegation of authority to loan state money based on an unbridled agency determination of a project being "worthwhile" was an unconstitutional delegation of authority. There, the substantive issues had not been so long subject to common law definition as to have already been shaped and defined prior to the statutory enactment.

arise. See, e.g.: Application for Water User Permit No. 53972 by David A. & Linda J. Seed, Application for Beneficial Water Use Permit No. 47841-g76M by John A. March, Jr..

C. MPC alleges that the Department has an independent duty to ascertain the viability of each application, regardless of whether the Department's duty to hold a hearing arises. See, MPC issue No. 4. The Department agrees and has fulfilled that duty in the instant case.

The allegation that, "The Power company and the Department have oftentimes learned of deficiencies of an application during a hearing" has no bearing herein.

D. MPC further objects to the various Departmental functions performed in carrying out the Water Use Act. See, MPC issue No. 5. The roles played by various Department offices and employees are reasonable and necessary to administer the Act. Further, the roles of Departmental staff experts, hearing examiner, and final decision makers are contemplated by the Administrative Procedure Act. See, MCA § 2-4-611; 2-4-614(1)(f); 2-4-621.

E. The fact that the precedent relied on by the Department has not been affirmed by a court is of no consequence. See, MPC Issue No. 7. Until that Departmental action is overruled, it remains a valid guideline for the Department in assuring agency actions are reasonable in treating similarly situated applications consistently.

F. The Show Cause Order neither changes the statutory burden of proof nor deprives MPC of any of its water rights. See, MPC issue No. 8. MPC has not been burdened with any standard of

proof, but merely has been required to do what all objectors must do in order for the right to a hearing to arise - state a valid objection. MPC has been given ample opportunity to submit a valid objection to the Department. It has failed to do so. Hence, the right to participate in a contested case hearing as a party-objector does not arise. § 85-2-309 MCA (1983).

G. The fact that MPC alleges it seeks to protect its ability to generate power for its customers is not germane. See, MPC issue No. 9. MPC's rights and power generation capacity are being protected by the Department already. It simply cannot expand those rights by insinuating the size of its customer base somehow insulates it from the minimum duty of all objectors - to state a valid objection. Every objector and applicant before the Department seeks to protect beneficial uses of water for the benefit of the individual appropriator, customers thereof, or the general public. Where the legislature intends the Department to include economic benefits in the permitting procedure, it expressly so states. See, § 85-2-311(2)(a)(B) MCA (1983). The Permit in issue herein is not subject to that statutory language.


WHEREFORE, based on the foregoing and on the records on file with the Department, the Department hereby issues the following:

ORDER

1. MPC's objections to Application No. 42667-s41I by Jaromir J. Dan are hereby declared invalid and are stricken.

2. The other objections filed hereto remain valid.
Therefore, the Department will contact the remaining objectors regarding settlement or hearing in this case.

DONE this 1 day of November, 1984.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6601

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on Nov. 8, 1984, she deposited in the United States mail, Certificate mail, an order by the Department on the Application by JAROMIR J. DAN, Application No. 42667-s411, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Jaromir J. Dan, P.O. Box 948, Helena, MT 59624
2. R.V. RANCh Co., Box 1700, Helena, MT 59624
3. C.W. & Beryl Smallwood, 5270 Hwy 12 W., Helena, MT 59601
4. Frank Gruber, 4930 Hwy 12 W., Helena, MT 59601
5. Montana Power Co., 40 East Broadway, Butte, MT 59701
6. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 hand deliver
7. T.J. Reynolds, Helena Field Office (inter-departmental mail)
8. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 8th day of November, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	ORDER TO SHOW CAUSE
NO. 42667-411 BY JAROMIR J. DAN)	

* * * * *

The objection filed with the Department of Natural Resources and Conservation by the Montana Power Company to the above-named application is identical in language to a number of objections previously filed by this entity with respect to similar applications. These objections all claim generally that there is a lack of unappropriated water available for the applicants' purposes, and that diversions made pursuant to these applicants' plans would result in adverse affect to the water rights claimed by the Montana Power Company. See MCA 85-2-311(1a) and (1b).

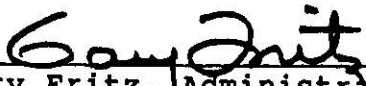
No claim is made either expressly or by implication in the present objection that the Applicant's proposed use is not a beneficial one, or that the Applicant's proposed means of diversion are not adequate for his purposes. See MCA 85-2-311(1d) and (1c). Nor has the Department in its own behalf indicated any concerns for the existence of these statutory criteria for a new water use permit. See generally, MCA 85-2-310(2).

Commencing with the Proposal for Decision In re Brown, and continuing through a number of applications where the Montana Power Company presented evidence at hearings held pursuant thereto, the Department of Natural Resources and Conservation has concluded that the scope and extent of Montana Power Company's rights to the use of the water resource as indicated by the evidence therein did not warrant denial of the respective applications for new water use permits. Since the instant objection alleges similar matters to those involved in prior hearings, hearings on the factual issues suggested by the present controversy threaten a waste of time and undue time and expense to the parties involved. See generally, MCA 2-4-611(3) (1981); MCA 85-2-309 (1982). The principles of stare decisis dictate that Montana Power Company be compelled to make a preliminary showing that its objection to the instant application has merit.

WHEREFORE, the Montana Power Company is hereby directed to show cause why its objection should not be stricken and the instant application approved according to the terms thereof. Said Objector shall file with the Department within 20 days of the service of this Order, affidavits and/or other documentation demonstrating that the present Applicant is not similarly situated with respect to prior applicants for whom permits have been proposed over this Objector's objections; and/or offers of proof as to matters not presented in prior hearings, which matters compel different results herein; and/or argument that the proposed dispositions in such prior matters were afflicted by error of law

or were otherwise improper; and/or any other matter that demonstrates that the present objection states a valid cause for denial or modification of the instant application.

DONE this 24th day of April, 1984.



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620
(406) 444 - 6605

AFFIDAVIT OF SERVICE
ORDER TO SHOW CAUSE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 24, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by JAROMIR J. DAN, Application No. 42667-s411, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Jaromir J. Dan, P.O. Box 948, Helena, MT 59624
2. R.V. Ranch Co., Box 1700, Helena, MT 59624
3. C.W. & Beryl Smallwood, 5270 Hwy 12 W., Helena, MT 59601
4. Frank Gruber, 4930 Hwy 12 W., Helena, MT 59601
5. Montana Power Co., 40 East Broadway, Butte, MT 59701
6. K. Paul Stahl, Attorney, 301 First National Bank Bldg., P.O. Box 1715, Helena, MT 59624 (*hand deliver*)
7. T.J. Reynolds, Helena Field Office (inter-departmental mail)
8. Gary Fritz, Administrator, Water Resources (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 24th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. Gilman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 12-1-1987

* * * * *

* * * * *

CASE # 42667

STATEMENT OF THE CASE

On November 3, 1981, The Applicant filed an Application for Beneficial Water Use Permit, seeking to appropriate 370 gallons per minute (gpm) up to 154.53 acre-feet of surface water per year: 15 gpm up to 1.5 acre-feet per year for domestic use, 5 gpm up to 53 acre-feet for stockwater, 350 gpm up to 140 acre-feet per year for new sprinkler irrigation on 50 acres, and 12.5 acre-feet per year carry-over storage for fish and wildlife purposes. The proposed place of use is the E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, Township 10 North, Range 05 West for domestic, stock, and fish and wildlife purposes, the S $\frac{1}{2}$ N $\frac{1}{2}$ of Section 24 for irrigation of 31 acres and the N $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 24 for irrigation of 19 acres, all in Township 10 North, Range 05 West, Lewis and Clark County, Montana.

The water is to be diverted by means of two pumps, one for irrigation and one for stock and domestic use, from a reservoir created by an earth dam across the water source, an unnamed tributary of Blue Cloud Creek. The proposed on-stream capacity of the reservoir is 12.5 acre-feet. The proposed point of diversion (the reservoir) is the E $\frac{1}{2}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, Township 10 North, Range 05 West, Lewis and Clark County, Montana.

The proposed period of use is January 1 to December 31, inclusive, for domestic, stock, and fish and wildlife uses; and April 15 to October 15, inclusive, for irrigation.

The pertinent portions of the Application were published in the Independent Record, a newspaper of general circulation in the area of the source, on April 29, and May 6 and 13, 1982.

Four timely objections were filed to the Application.

Frank Gruber objected to the Application on the basis that Blue Creek is the only source of stockwater he has for a 500-acre pasture, that Blue Creek in a dry year barely provides enough water for the stock, and therefore that any appropriation upstream from him would eliminate his only stockwater source.

R.V. Ranch objected to use of Blue Cloud Creek water for irrigation, because the proposed 350 gpm appropriation would badly decrease the flow in approximately 1 mile of the stream R.V. Ranch uses for stockwater. R.V. further alleged that the stream already dries up in late summer in some years. R.V. stated on the Objection that they would not object to the 15 gpm requested for domestic use, nor to a small (5 gpm) flow-through pond for stock use.

C.W. and Beryl Smallwood objected to the Application on the basis that the proposed appropriation on Blue Cloud Creek might infringe on the Objectors' senior water rights. The Objection alleges that normally there is only enough water for livestock, that the water amount already appropriated on Blue Cloud Creek "is probably the maximum flow except for flash floods and early spring run-off", and that any further appropriation represents an over-appropriation. The Smallwoods' Objection further objects to the proposed fish and wildlife use, alleges that the amount requested for domestic use appears excessive, and alleges that the Notice remark that Blue Cloud Creek is not a perennial flowing stream is erroneous, since the stream has never failed to provide at least enough flow for stockwater on the Smallwood property within the last 30 years.

Montana Power Company objected to the Application on the basis that it would adversely affect the Company's claimed water use rights at their dams downstream on the Missouri. (The Objection did not include the fish and wildlife use, provided that it is non-consumptive.)

Commencing with the Proposal for Decision In re Brown, and continuing through a number of hearings where the Montana Power Company presented evidence on similar objections, the Department has concluded that the scope and extent of MPC's rights to water as indicated by the evidence did not warrant denials of applications for new water use permits. Therefore, on April 24, 1984, the Department directed the Montana Power Co. to show cause why its objection should not be stricken. On May 14, 1984, MPC filed a Memorandum of Cause. On November 1, 1984, MPC's objections to the Application in this matter were declared invalid and were stricken.

On April 19, 1984, Jim Beck mailed a copy of his Field Report on Application No. 42667 (hereafter, "Field Report") to all parties of record. The date on the Field Report, April 22, 1986, obviously is a typographic error. It is not possible to determine from the record what the correct date is, apart from the fact that it is prior to the April 18, 1985 mailing date and subsequent to the March 28, 1985 meeting reported therein.

EXHIBITS

The Applicant did not offer any exhibits for inclusion in the record in this matter.

The Objectors offered 32 exhibits for admission in the record.

Objectors' Exhibit 1 is an affidavit by William Wall, with photocopies of a map and an escrow contract attached.

Objectors' Exhibits 2 through 10 are photographs taken by counsel Lester Loble on May 8, 1985.

Exhibit 2 shows Blue Cloud Creek where it enters Ten Mile Creek.

Exhibit 3 shows Blue Cloud just upstream from Exhibit 2.

Exhibit 4 shows a road crossing on Blue Cloud approximately one-half mile upstream from its mouth.

Exhibit 5 shows Objectors Smallwood's ditch from Blue Cloud.

Exhibit 6 shows road crossings on Blue Cloud Creek approximately one mile upstream.

Exhibit 7 shows a dry creek bed on Blue Cloud about one and one-half miles upstream.

Exhibit 8 shows a dry creek bed on Blue Creek above the confluence of the unnamed tributary on which the Applicant has applied.

Exhibit 9 shows the unnamed tributary which is the proposed source for appropriation, just below Applicant's property.

Exhibit 10 shows ponding of the unnamed tributary on Applicant's property.

Objectors' Exhibit 11 is a photocopy of a Statement of Claim for Existing Water Rights (hereafter, "SB76 Claim") for Irrigation, by C.W. Smallwood (No. 133661).

Objectors' Exhibits 12 through 32 are photocopies of SB76 Claims by the Applicant Jaromir Dan:

Exhibits 12, 13, 14, 15, and 16 are claims for existing stockwater use rights (Claim Nos. 89090, 89091, 89092, 89103, 89104.)

Exhibits 17, 18, 19, 20, 21, 22 are photocopies of SB76 Claims for existing irrigation use rights. (Claim Nos. 89098, 89099, 89102, 100007, 100008, 100009.)

Exhibits 23, 24, 25, 26, 27 are photocopies of SB76 claims for existing domestic use rights. (Claim Nos. 100005, 100006, 89100, 89101, 100004).

Exhibits 28, 29, 30, 31, 32 are photocopies of SB76 Claims for other uses (mining). (Claim Nos. 89093, 89094, 89095, 89096, 89097).

Objectors' Exhibits 1 through 32 were accepted into the record without objection.

The Hearing Examiner also agreed to take notice of three documents of public record, introduced for the purpose of showing land ownership by Alfred and Bertha Clausen, predecessors in interest of Objector Frank Gruber. (Bertha Clausen appeared as a witness for the Objectors.) The three documents are a 1964 assessment list, a 1947 second-payment tax receipt, and a 1948 first payment tax receipt, all naming Alfred L. and Bertha F. Clausen as the owners of record of the property.

The Department offered seven exhibits for admission into the record (Exhibits 1 through 7, and 11, were not offered or accepted):

Department Exhibit 8 is a photocopy of an SB76 Claim for stockwater by R.V. Ranch Company (Claim No. 120883).

Department Exhibit 9 is a photocopy of an SB76 Claim for other uses (mining), by R.V. Ranch Company (Claim No. 120891).

Department Exhibit 10 is a photocopy of an SB76 Claim for stockwater from Blue Cloud Creek, by Richard Lichtwardt (Claim No. 89552).

Department Exhibit 12 is a photocopy of an aerial map, marked at the hearing. The pencil numbers indicate where various photographs introduced by the Objectors were taken; the red marks indicate where Jim Beck took two photos included in Department's Exhibit 13.

Department Exhibit 13 consists of eight single photographs and six composite photographs (two or more photos taped together). The photographs were taken by Jim Beck on March 21, 1985, and are marked for identification by a typed explanation on the back. The photographs show parts of the Applicant's land, the unnamed tributary of Blue Cloud Creek which is the proposed source, springs on the Applicant's land, Blue Cloud Creek, and some of Objector Smallwood's property.

Department Exhibit 14 is the original of Jim Beck's Field Report, sent out to all parties of record under cover letter on April 13, 1985. Figure 3 was marked by Jim Beck at the hearing with a solid black line to show the unnamed tributary, and by a dotted blue line to show the drainage basin for that tributary.

Department Exhibit 15 is a photocopy of a March 12, 1982 Soils Report by Jim Beck concerning Applicant's land.

Department Exhibits 8, 9, 10, 12, 13, 14, and 15 were accepted into the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, hereby makes the following proposed Findings of Fact, Conclusions of Law, and Order.

PROPOSED FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter herein and the parties hereto, whether they appeared at the hearing or not.

2. The Application for Beneficial Water Use Permit in this matter was duly filed with the Department of Natural Resources and Conservation on November 3, 1981, at 12:01 p.m.

3. On April 29 and May 6 and 13, 1982, the Department duly published the pertinent portions of the Application in the Independent Record, a newspaper of general circulation in the area of the source.

4. The Applicant intends to use the water for stockwater, domestic use, and irrigation, which purposes are of beneficial use to the Applicant.

5. The source of supply for the proposed appropriation is surface water from an unnamed tributary of Blue Cloud Creek.

6. Applicant Jaromir Dan testified that he has a swampy area comprised of mud and water on his property, and would like to excavate the area into a pond, collect snowmelt and spring runoff, and use the water for irrigation and other uses as long as it lasts.

The Applicant testified that water for the irrigation portion of the proposed project would be diverted from the pond and pumped upslope by a diesel or gasoline engine, then allowed to run down over the area in a drip pipe or furrows. He stated that he feels a sufficiently large and deep reservoir would gather enough water to irrigate with in May, June, and maybe part of July.

He stated that he believes water doesn't make it out of the "dish" in the landscape where the land is located, at least in low water, but rather settles on the rock layer and is "sucked up" by plant cover. Mr. Dan added that he doesn't believe the tributary water makes it to the Objectors, since the stream has dried up below the confluence with Blue Cloud Creek for about 1/4 mile every summer since 1982. He feels the flow in the lower Blue Cloud Creek is the result of a spring or springs.

7. Mr. Dan testified that the ponding would keep water through the summer to serve for fire protection and other uses, as well as for irrigation. He stated that he would introduce fish into the pond, and that he has a stocking permit from the Montana Department of Fish, Wildlife, and Parks and has stocked a beaver pond already present on the property. Mr. Dan stated that

he would utilize carryover storage for fish and wildlife, and that he felt that the pond would be of benefit to neighboring lands because of the wildlife, among other things.

The Applicant stated that he would also use the water for domestic purposes, including irrigation of a garden, and for watering several head of cattle and horses.

8. The Applicant testified that the applied-for appropriation would be "an addition to recorded water rights." He stated that the property has other, "considerable", recorded water rights dating back as far as the 1860's. He testified that part of the current proposed place of use is covered under the filed SB75 Claims, but that there isn't any way to ascertain exactly the historical use of the water.

9. Responding to an affidavit which Objectors' witness William Wall filed, in which Mr. Wall stated that a portion of the Applicant's proposed place of use belonged to him rather than to the Applicant, Mr. Dan testified that he was under agreement with Mr. Wall to purchase the additional lot in question at the time when he filed the Application in this matter. Since that time his plans have changed, and he no longer is able to purchase the additional lot.

In addition, Mr. Dan testified that he no longer is the owner of the remaining portion of the land, due to financial difficulties. His co-purchaser is the owner. However, Mr. Dan is occupant and manager of the property.

10. Mr. Dan testified that the likelihood of completing the project was much greater at the time the Application was made than it is now. Mr. Dan testified that he presently is in serious financial difficulty, and that "it is highly improbable, should this situation continue," that he would ever be able to dig the pond or make the planned improvements. He stated that he was interested in continuing the Application since his situation might change, but that it hasn't changed for about three years.

Mr. Dan testified that he might not develop the pond even if he could, due to alleged harassment and intrusions by residents of the area.

11. Counsel for the Objectors introduced 21 Statements of Claim for Existing Uses filed by the Applicant; five stockwater claims, six irrigation claims, five domestic claims, and five "other uses" (mining) claims. See Objectors' Exhibits 12 through 32. The claims appear to cover a much larger area than the proposed place of use.

12. William Wall, witness for the Objectors, testified that he is the owner of the property covered by the SB76 Claims (an area originally designated as Mineral Survey 609) except for two lots to Dan and co-purchaser, and that therefore the most land which the Applicant could irrigate is 40.5 acres.

13. Bertha Clausen, witness for the Objectors, was the predecessor in interest to Objector Frank Gruber. She testified that she had lived on that property from 1947 to 1971, and that she was familiar with Blue Cloud Creek, and with the Smallwood ranching operation, in addition to their own uses. She testified

that she didn't believe any water would be available for the Applicant's proposed operation, since the water needs of the Clausen and Smallwood properties had taken all of Blue Cloud Creek and there was never any water "left over".

14. Objector Frank Gruber bought the Clausen property in 1976. He uses Blue Cloud Creek to water stock on 500 acres. Mr. Gruber testified that there hasn't been enough water to cover Gruber and Smallwood irrigation and stockwater needs, and that to his knowledge there was no surplus water. Mr. Gruber stated that, at the time of the May 10, 1985 hearing, the mainstem of Blue Cloud Creek was completely dry and that no water was emptying into Ten Mile Creek.

Mr. Gruber testified that he believes the headwaters of Blue Cloud Creek are actually on the unnamed tributary rather than what has been designated as the mainstem of Blue Cloud. He stated that the "bulk" of the water had been coming into Blue Cloud Creek at the time of the site visit.

15. Objector C.W. Smallwood has property at the mouth of Blue Cloud Creek, where it empties into Ten Mile Creek. He testified that he uses Blue Cloud for stockwater, and to irrigate five acres of alfalfa/grass and ten acres of grass. He stated that he used to use a small ditch to divert the irrigation waters (see Objectors' Exhibit 5), but that he discontinued using the ditch in 1970 because there never was enough water. Mr. Smallwood stated that he tried to pipe the water, but couldn't get enough flow, and also could not sprinkler irrigate because of low flow.

Mr. Smallwood testified that there had not been any surplus water in Blue Cloud Creek in the last 14 years, not counting the Applicant's SB76 Claims.

16. Objector R.V. Ranch, represented by James O. Connell, asked that their written Objection to the Application stand as their testimony. (See Statement of the Case.) Mr. O'Connell added that they are concerned about the proposed appropriation because R.V. runs a substantial number of cattle "in there" six to eight months a year.

Ranch foreman Joe Enger testified that they could have problems getting stockwater if the Applicant dams up the tributary while he digs the proposed pond. Mr. Enger stated that there would not be any water running down for cattle when the pond was low or was being filled; that there would have to be some control on the pond to allow flow through.

17. Jim Beck, Agriculture Specialist for the Water Rights Bureau Helena Field Office, testified that the soils on the proposed place of use are moderately deep, with a fairly high intake capacity and a moderate holding capacity. The soils would be adequate for sprinkler irrigation, but would have to be irrigated every 10 to 14 days to avoid crop stress, since the soils have only a moderate capacity to store water.

Mr. Beck testified that the general type of proposed irrigation system was adequate, since sprinkler and drip systems were adaptable to the place of use, and stated that there shouldn't be any problems with the proposed irrigation, given

"reasonable management". However, he noted that the proposed storage volume of the pond would sustain the proposed withdrawal rate for only 8 to 12 hours.

18. Mr. Beck estimated the expected average flows at the mouth of Blue Cloud Creek by using the Potts method (see Field Report, Figure 2) to calculate the average annual discharge of the drainage, based on area of the Blue Cloud Creek drainage and the average precipitation. Mr. Beck then estimated monthly average flows by proportioning the annual flow on the basis of a gaged stream in the area, Ten Mile Creek near Rimini. The monthly flow estimates range from 5 miners' inches in January (.13 cfs) to 294 m.i. (7.36 cfs) in May. (See Field Report, Table 1.) He testified that the accuracy of these estimates depends on how well the Potts method fits the situation, and whether the monthly flow variances in Ten Mile Creek carry over to Blue Cloud Creek.

19. Mr. Beck stated that, based on the flow model, on channel loss and the existing use rights of approximately 2 cfs (not counting Applicant's SB76 Claims), water is available for appropriation only for a short period of time. (The Field Report indicates about 70 days when water will be available; from late April to late June). Based on the relative size of the drainage

area of the tributary¹, and on the need for about 1 cfs to wet the stream bed (see Field Report)², water from the tributary most likely would be available for appropriation by the Applicant only from about May 15 to June 15.

Mr. Beck stated that the groundwater from springs on the place of use doesn't have sufficient flow to maintain the water level in the proposed pond.

Based upon the foregoing proposed Findings of Fact, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto, whether present at the hearing or not.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

¹ Mr. Beck originally characterized the drainage for the tributary as being about half the total drainage area, but revised that figure downward after reviewing a map. (Department Exhibit 14, Figure 3). However, he testified that during his two visits to the site, the tributary appeared to be contributing about half the total volume.

² In most places, Blue Cloud Creek and its tributary flow in a gravel bed. Under low flow conditions, the flow may disappear into the gravel and only reappear where the underlying layer (most likely a clay layer) surfaces in the bed. (Field Report, testimony of Jim Beck.)

3. The Department must issue a permit in an application for new appropriation if the Applicant proves by substantial credible evidence:

- (a) there are unappropriated waters in the source of supply:
 - (i) at times when the water can be put to the use proposed by the applicant;
 - (ii) in the amount the applicant seeks to appropriate; and
 - (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The uses proposed by the Applicant--irrigation, stockwatering, and domestic uses--are beneficial uses of water. MCA § 35-2-102(2).

5. The Applicant's proposed means of diversion and operation of his appropriation works are adequate, and his proposed means of construction can be made adequate with the inclusion of a bypass channel or trickle tube which would ensure bypass flow. (See Finding of Fact 16.)

6. The evidence in the record indicates that there are sufficient unappropriated waters in the source of supply to cover the Applicant's proposed stockwater and domestic uses at the times when the water can be put to those uses, and in the amount the Applicant seeks to appropriate. In addition, the record

indicates that water is available for the proposed storage for fish and wildlife uses if diverted during spring runoff. (Field Report, testimony of Jim Beck, testimony of Jaromir Dan.)

However, there do not appear to be enough unappropriated waters in the source of supply to cover the proposed irrigation uses. (Testimony of Jim Beck, Bertha Clausen, C.W. Smallwood, and Frank Gruber.) The flow model prepared by Jim Beck indicates that water would be available in quantities needed for irrigation for a very short time (see Findings of Fact 18 and 19), and that the size of the proposed pond is insufficient to store enough water for any appreciable amount of irrigation beyond that time. (See Finding of Fact 17).

It is possible that a certain portion of the water in the unnamed tributary does not make it down from the Applicant's land in low flow, due to topography. (See Finding of Fact 6.) However, at a time previous to the hearing which was characterized as already being low flow (see Finding of Fact 14), evidence indicates that the unnamed tributary was contributing a large amount of the flow which was available to prior appropriators. (See Finding of Fact 14, Footnote 1.)

7. Contrary to the position taken by counsel for the Objectors, the fact that the Applicant does not own the place of use does not bar him from applying for, and receiving, a beneficial water use permit. Nothing in statutory or case law suggests that a person must own the property to which the water will be applied, in addition to meeting the statutory criteria. (See MCA § 85-2-311.) However, a lessee or other such water user

is not entitled to take the water right with him/her if they leave the property. See generally Montana Department of State Lands v. Pettibone, 42 St. Rep. 869, _____ Mont. _____ (1985); Connolly v. Harrel, 102 M. 295, 57 P.2d 781 (1936).

8. Mr. Dan testified that it was unlikely that he would ever be able to develop the proposed appropriation, and also stated that he might not do so even if his financial situation improved. (See Finding of Fact 10.) To grant Mr. Dan a Permit under these circumstances would allow him to retain a priority date on a "paper right", and to possibly foreclose use by a later appropriator who could put the water to immediate beneficial use.

One of the purposes of Montana's water permit system is to develop records of all water rights, in part to give possible appropriators notice of prior appropriations on the proposed source of use. See generally MCA § 85-2-101(2). To allow an undeveloped right to remain on record may have a chilling effect on prospective appropriators who look at the records in order to determine if any water is available for appropriation, or how many users are competing for the water. Additionally, tying up water in hopes that a project will be possible sometime in the future prevents maximum use of the water, contrary to state policy. (See MCA § 85-2-101(3).)

The Department has previously held that "an appropriator must in all events have a bona fide intent to appropriate water...". (Citations omitted.) In re: City of Bozeman, Proposal for Decision at p. 8, (Final Order, January 9, 1985.) The Applicant must not only have the intent, but must proceed to develop the

proposed project with due diligence, taking into account the magnitude of the project and the reasonable time necessary for development. (See MCA § 85-2-312(2).) See generally, Bailey v. Tintinger, 45 Mont. 154, 122 P. 575 (1912); In the Matter of Beneficial Water Use Permit Nos. 31587-g41F and 33294-g41F, Proposal for Decision, March 4, 1985.

In the present instance, the Applicant testified that he could not proceed with due diligence. In addition, he indicated that he may not have the requisite intent, since he stated that he might not develop the project even if he could. (Finding of Fact 10.)

Under different circumstances, it is possible that the Applicant could be granted a permit for at least a part of the applied-for uses. (See Conclusion of Law 6, supra.) However, these uses are dependent upon the reservoir development which the Applicant has testified may never occur: The Applicant's testimony in this matter requires that the Application be denied in its entirety.

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 42667-s411 by Jaromir J. Dan is hereby denied.

DONE this 1st day of October, 1985.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and

oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on October 1, 1985, she deposited, postage prepaid, in the United States first class mail, a FINAL ORDER by the Department on the Application by Jaromir Dan, Application No. 42667-s41I, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Jaromir Dan, P.O. Box 948, Helena, MT 59624
2. R.V. Ranch Co., c/o James O'Connell, P.O. Box 1700, Helena, MT 59624
3. C.W. and Beryl Smallwood, 5270 Highway 12 West, Helena, MT 59601
4. Frank Gruber, 4930 Highway 12 West, Helena, MT 59601
5. T.J. Reynolds, Water Rights Bureau Field Office Manager, Helena, MT (inter-departmental mail)
6. Peggy A. Elting, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by *Donna K. Elser*

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 1st day of October, 1985, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy John
Notary Public for the State of Montana
Residing at *Helena*, Montana
My Commission expires *3-1-88*

CASE # 42667